

“ * * * He was devoted to his family and wished to provide for them in a way to secure them against any possible disposition which he might develop in old age to hazard his fortune in business deals. * * * His desire was to place funds beyond his own control which would insure the financial protection of his wife and children. This was the primary object of the creation of the trusts and of making the transfers, as he expressed himself to the lawyer who prepared the trust instruments for him.”

This case was reopened before the Board to permit the introduction of the trust agreements (33 B. T. A. 290). The Circuit Court of Appeals sustained the finding of the Board that the gift was not in contemplation of death and was not taxable.

In *Helvering v. National Grocery Company*, decided by the Supreme Court May 16, 1938, 304 U. S. 282, Mr. Justice Brandeis speaking for the court says at p. 294:

“The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon trial de novo, in effect, an independent determination of the matters which had been in issue before the Board. The court was without power to do so. *Helvering v. Rankin*, 295 U. S. 123, 131, 132. * * * To draw inferences, to weigh the evidence and to declare the result was the function of the Board. * * *

In the pending case the court's own statement of the evidence (R. 50-52) is conclusive of its sufficiency. Being without power to choose between conflicting inferences or to weigh the evidence, the court obviously erred in reversing the Board unless the gift was from its very nature, regardless of all other evidence and as a matter of law, in contemplation of death. Such seemed to be the position of the court. “The trust was not designed to make pro-

vision for the beneficiaries during his life. None of the property or increment thereto was to reach them until after his death * * *. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death." (Court's Opinion, R. 54.)

If those factors are presented as merely items of evidence to be weighed with other evidence in the case, then clearly the court is weighing the evidence and drawing its own inferences and conclusions therefrom in violation of the settled rule.

If the court means to say that gifts which are not intended to come into the actual possession or enjoyment of the beneficiaries until after donor's death and so are necessarily *pro tanto* meant to provide for them after donor's death; if it means to say that such gifts are therefore in contemplation of death as a matter of law, then clearly it is wrong.

In *Smith v. United States*, 16 Fed. Supp. 397 (D. C. Mass. 1936), *aff'd. per curiam sub nom., United States v. Nichols*, 92 F. (2d) 704 (C. C. A., 1), District Judge Brewster said at p. 402:

"It is argued that the transfer should be deemed as one made in contemplation of death because the decedent thereby provided for his family after his death, and, therefore, it was a testamentary disposition of his property. I take it this is not the test. If it were, every irrevocable trust that provided for the disposition of the trust property after the death of the donor would necessarily be deemed a transfer by way of trust in contemplation of death. That such a test has never been applied is obvious from consideration of the cases."

THE FACT THAT A TRUST INSTRUMENT PROVIDES FOR BENEFICIARIES AFTER DONOR'S DEATH AND THAT DONOR INTENDED TO SO PROVIDE DOES NOT MAKE THE GIFT TAXABLE AS A MATTER OF LAW AS IN CONTEMPLATION OF DEATH.

A reading of the statute, an examination of its history and the history of the Treasury Regulations and a study of the Supreme Court cases is convincing that the position of the lower court is without basis.

HISTORY OF SUPREME COURT CASES.

In cases of the type here involved—trusts in which the income is withheld from the beneficiaries until donor's death—the Government has usually taken the position that they fall under the second of two statutory categories of gifts, (1) in contemplation of death or (2) intended to take effect in possession or enjoyment at or after death. That was the original position taken by the Commissioner in the pending matter (R. 14, 17), but later abandoned. If the court's ruling in our case, however, is correct, it would follow that trusts intended to take effect in actual enjoyment after death, whether or not within the technical statutory meaning of the possession and enjoyment provision, are in contemplation of death. The motive and intent to provide for the beneficiaries after donor's death is by the very terms of the instrument present in all such cases. That is exactly what all such trust instruments do.

Futile and most costly to the revenue would appear the Government's long and unsuccessful struggle, commencing with *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and concluding with *McCormick v. Burnet*, 283 U. S. 784, and sister cases, to establish that such gifts were taxable under the possession and enjoyment clause, if the simple assertion of liability under the contemplation of death clause would have brought success. Moreover, it would seem unlikely that this court with the statute and all the necessary facts before it would repeatedly in that

line of cases reject taxability without comment that on the face of the record taxability was patent on the ground of contemplation of death.

The fact is that in each of those cases the court had before it both provisions appearing in the same sentence of the statute. It had before it the argument that the gift was testamentary because of the postponed enjoyment and intent to provide for beneficiaries after donor's death, and it passed sometimes expressly and sometimes impliedly on the very question involved here.

THE COURT'S RULING AS TO THE CONCLUSIVE EFFECT OF POSTPONED ENJOYMENT AND INTENT TO PROVIDE FOR BENEFICIARIES AFTER DONOR'S DEATH IS CONTRARY TO MANY DECISIONS OF THIS COURT.

Shukert v. Allen, 273 U. S. 545;

Reinecke v. Northern Trust Co., 278 U. S. 339;

May v. Heiner, 281 U. S. 238;

Becker v. St. Louis Union Trust Co., 296 U. S. 48;

McCormick v. Burnet, 283 U. S. 784;

Burnet v. Northern Trust Co., 283 U. S. 782;

Morsman v. Burnet, 283 U. S. 783;

Helvering v. City Bank Farmers Trust Co., 296 U. S. 85;

Helvering v. Helmholtz, 296 U. S. 93;

White v. Poor, 296 U. S. 98;

Hassett v. Welch, 303 U. S. 303;

Helvering v. Marshall, 303 U. S. 303;

Helvering v. Bullard, 303 U. S. 297; and other cases.

SHUKERT v. ALLEN.

The facts as set forth in the District Court (300 F. 754) and in the decision of the Circuit Court of Appeals (6 F. (2d) 551) show that on May 5, 1921, donor created for the benefit of his three children a trust fund of about

two hundred thousand dollars to accumulate for a period of thirty years, subject to slight diminution in case of remote contingencies. He was fifty-seven years of age when the trust was made and died four months later. The District Court found from the donor's own statement that (p. 757):

" * * * It is a trust created by Mr. Shukert, which he intended to take effect in possession and enjoyment long after he should have passed away; after it might be that the large fortune which he had accumulated had been lost through misfortune, or extravagance, or waste, or things that might happen after that. His care went clear to the time when 30 years should have gone by. His care for his children reached clear to that point, and he intended at that time it should take effect."

The gift was held taxable under the second clause and the ruling was affirmed by the Circuit Court of Appeals (6 F. (2d) 551).

When the case came to the Supreme Court of the United States, *the Government argued* (see outline of Government's argument, 71 L. Ed. 766) that:

"The intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate, the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testamentary. The trust in question is in substance and effect testamentary, because it postpones the ordinary incidents of ownership until the donor's death, and in fact is, and was intended to be, a postmortem disposition of the property."

Mr. Justice Holmes delivered the unanimous opinion of the United States Supreme Court reversing the lower court and holding the trust not taxable. He discussed its

taxability under the contemplation of death clause as well as under the possession and enjoyment clause, though the latter was the point stressed by the Government and the court. He said (273 U. S. at 547):

“ * * * It seems plain from the little evidence that was put in that the testator was ~~not~~ acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that, being fifty-six years old, if he thought about it, he would have contemplated the possibility or probability of his being dead before the emergency might arise. Of course, it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute. * * *

“ * * * But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death.”

BEINECKE v. NORTHERN TRUST CO.

On January 2, 1929, the United States Supreme Court in the case of *Beinecke v. Northern Trust Co.*, 278 U. S. 339, passed on the taxability under the Revenue Act of 1921* of seven trusts created by decedent during his lifetime. By reason of powers of revocation contained in two of the trusts, it was held that those transfers were not

*Identical with Revenue Act of 1926 in this contemplation of death provision.

complete until decedent's death and on that ground were taxable. In a third, life incomes were given the wife and children with distribution of corpus after donor's death.

"The other four 1919 trusts were severally made for the benefit of a child of the settlor. As drawn, they provided for the accumulation of the whole income until the period of distribution of the corpus, after the death of the settlor, except so much thereof as the settlor might, from time to time, direct to be paid to the beneficiary named. By amendments made on June 28, 1921, in the manner provided in the trust instruments, the beneficiary under each was to be paid the income." (From Opinion of Circuit Court of Appeals, 24 F. (2d) 91, 92.)

Donor died in 1922.

Here again the Government relied on the possession and enjoyment theory. The Supreme Court, however, had before it trust instruments providing for donor's children after his death. The intent was clear on their face. Under the Court of Appeals' ruling in our case this conclusively showed contemplation of death. Yet, referring to these the Supreme Court said (p. 347):

" . . . as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax."

It seems reasonable to infer that the court did not consider the intent to provide for his children after his death as shown by the trust instrument to be equivalent to testamentary disposition or contemplation of death.

The court made no distinction between the trust in which the life income was given to the beneficiaries and the four in which it was to accumulate. (The amendment of the four trusts in 1921 probably could not alter the intent of the gift of 1919.) Logically there is no distinction so far as

this question is concerned. In each, ultimate provision is made and intended to be made for the beneficiaries after donor's death. And if that intent is to be construed as testamentary and in contemplation of death, then all such gifts are taxable whether the income is to accumulate or to be distributed.

Mr. Justice Stone speaking for the court said (p. 347):

"In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute.

"* * * The two sections read together indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment."

MAY v. HEINER. ♦

In *May v. Heiner*, 281 U. S. 238, donor transferred to trustees certain property, the income to be paid to her husband for life, then to her for life⁵⁰ "and after her decease all property in said trust, in whatsoever shape or form it may be, shall, after the expenses of the trust have been deducted or paid, be distributed equally among" her four children, their distributees, or appointees. Words could not make clearer her intent to provide for her children after her death.

Again the Government stressed the second statutory ground, apparently not conceiving success possible on the contemplation of death theory. But again the Supreme Court noted the presence of that problem and said (p. 243), Mr. Justice McReynolds speaking for the court:

"The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

It then quotes with approval from *Reinecke v. Northern Trust Co.*, *supra*, the passage which we have quoted from that case, ending with the sentence, "*It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in this statute.*"

BECKER v. ST. LOUIS UNION-TRUST CO.

In *Becker v. St. Louis Union Trust Company and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased*, 296 U. S. 48 (decided November 11, 1935), the contemplation of death issue was directly before the court. Decedent, a man seventy-seven years old, in good health and active in business, executed declarations of trust in favor of each of his four children. The instruments provided for the payment of \$300.00 a month out of the income to each child with power on the donor's part to increase or decrease that amount in his discretion; the balance of the income to accumulate and be added to the principal; and the entire trust property to go immediately and absolutely to the child on donor's death. He died seven years later. The value of the trust at that time was \$994,195. The district court found that the gift was both

in contemplation of death and intended to take effect in possession and enjoyment after death. The Circuit Court of Appeals for the Eighth Circuit reversed the case (76 F. (2d) 851) and found that the purpose of the gift was to make the children independent and to avoid income taxes. The Supreme Court (296 U. S. 48, 52), in holding the gift not taxable, said, Mr. Justice Sutherland speaking for the court:

“We are unable to find anything in the record which conflicts with the statement of the court below that evidence that decedent was in any way influenced by the thought of death was wholly lacking.”

Yet, there was the trust deed with the definite ultimate object that his children should have the property after his death. True, there were other motives—to save income tax and to make his children independent—and so in our case there was the motive to save part of his fortune from loss in the stock market. Clearly intent to provide for children after death was not even deemed evidence of contemplation of death within the statutory meaning.

On March 2, 1931, three cases were decided by unanimous decisions of the Supreme Court.

McCORMICK v. BURNET.

In the case of *McCormick v. Burnet*, 283 U. S. 784, 75 L. Ed. 1413, Mrs. McCormick, then eighty-three years of age, created a trust of some seven million dollars. The trust provided that the income should accumulate during the grantor's life with minor reservations. After her death the income was to go to her three children, share and share alike, the principal to be distributed upon the death of the last survivor of said children as each of the children might by will direct. The donor died on July 5, 1923, a few days less than five years after the execution of the trust. The transfer amounted to about one-half of her property.

Considerable evidence was taken as to the state of her health at the time of the execution of the trust. The evidence indicated that she was in good health for one of her age, that she was interested in her charities, that she was interested in making certain changes in her home and was interested in the future. No other evidence as to motive than the evidence of the agreement itself and of the general state of her health and interests is referred to in the Board of Tax Appeals opinion. The Board found that the gift was neither made in contemplation of death nor intended to take effect in possession or enjoyment at or after death.

The Board further held that the gift was not testamentary in character, was not intended to take effect in possession or enjoyment at or after death and was not a part of her estate for purposes of federal estate tax.

On September 20, 1930, the Circuit Court of Appeals in *Commissioner of Internal Revenue v. McCormick*, 43 F. (2d) 277, reversed the ruling of the Board of Tax Appeals on the ground that the gift was one intended to take effect in possession or enjoyment at or after death. The court, however, said at page 278:

"The Board found that the trust was not executed in contemplation of death. There is some evidence tending to support this finding. Petitioner does not challenge its soundness."

It is obvious that it was the intent of the donor to make provision for her children after her death. That is exactly what the trust instrument did. It did not purport to do anything else. In that sense the instrument was clearly one in which the motive was associated with death, but that is not at all the meaning either the courts or the Treasury Department itself gave to the language "transfers in contemplation of death." It should be noted particularly that the only testimony offered in this

case as to motive was the trust instrument itself, and evidence as to the state of health and anticipation of future activities on the part of the donor. Yet neither the Board of Tax Appeals nor the Court of Appeals nor the Supreme Court found that evidence insufficient to establish the nontaxability of this gift under the contemplation of death clause. The Court of Appeals specifically says the evidence is sufficient. The Board of Tax Appeals, with only two out of the fifteen members dissenting, found the evidence sufficient to sustain nontaxability. The Supreme Court affirmed the ruling of the Board of Tax Appeals *in toto*, reversed the Court of Appeals in its holding that the transfer was one intended to take effect in possession or enjoyment at or after death and reaffirmed the ruling it had made in *May v. Heiner, supra*.

This case is in many respects as identical with the case now pending before the court as two cases are often found. Mrs. McCormick was eighty-three years old when the trust was made. Mr. Hendrie was eighty. Both were in good health. Mrs. McCormick was interested in her charities and a new house. Mr. Hendrie was interested in business, golf and the stock market. His intent to gamble in the market gave him one definite and powerful incentive for the creation of his trust which Mrs. McCormick lacked, namely, the desire not to lose *all* of his fortune if the stock market went against him. Mrs. McCormick died *within* five years. Mr. Hendrie died *after* five years. The trusts in each case provided for the cumulation of the income and for distribution to their children after their deaths. Certainly if contemplation of death had any such meaning as is now attributed to it in this case, the McCormick trust would have been taxed as in contemplation of death.

BURNET v. NORTHERN TRUST CO. and MORSMAN v. BURNET.

On the very same day as the decision in the McCormick case, March 2, 1931, the Supreme Court in *Burnet v. Northern Trust Company*, 283 U. S. 782, 75 L. Ed. 1412, and in *Morsman v. Burnet*, 283 U. S. 782, 75 L. Ed. 1412, reaffirmed the doctrine of the Heiner case, affirming the Seventh Circuit in the Burnet case and reversing the Eighth Circuit in the Morsman case. It is significant also that at the very term and within a few days of these decisions the decision in *United States v. Wells*, 283 U. S. 102, 75 L. Ed. 867, was rendered. Clearly the court did not deem that this decision in any way conflicted with those in the cases cited.

The Northern Trust Company case, decided by the Seventh Circuit Court of Appeals on June 5, 1930, 41 F. (2d) 732, involved a gift made by donor almost six years prior to her death (seventy-seven years old at death). The gift was an irrevocable deed of trust to the Northern Trust Company reserving the entire net income to the settlor for life. After her death the net income was divided equally among her four children with remainder over to the issue of her children *per stirpes*. Here obviously was a case where the donor was providing for the natural objects of her bounty after her death. No evidence of motive other than that in the trust instrument itself appears to have been offered as no comment is made thereon by the court. The court held the transfer not taxable and its decision was affirmed by the Supreme Court of the United States.

In *Commissioner v. Morsman*, 44 F. (2d) 902, (14 B. T. A. 108), the Board had found that where Morsman reserved to himself the entire net income from the trust estate for life, remainder over to his four sons at his death, the trust was not taxable as a part of his estate though it constituted the bulk of his property and though

he died within three years of the day of its execution. The Circuit Court reversed the Board and the Supreme Court reversed the Circuit Court. Here again neither the Board nor the court makes any comment upon any evidence of motive other than that contained in the trust instrument. It is obvious from the trust instrument that he was providing for the natural objects of his bounty after death. But none of the courts, including the Supreme Court, construed the term "transfer in contemplation of death" to include such transfers merely because of the nature of the instrument, its intent to provide for the natural objects of the donor's bounty after his death, or because of the age of the donor at the execution of the trust.

HELVERING v. CITY BANK FARMERS TRUST CO.

In *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, decided November 11, 1935, decedent, Gertrude F. James, by trust agreement dated February 21, 1930, made provision for her children and her husband after her death. No other purpose for the gift was disclosed. She reserved to herself the income for life. She also reserved the right to revoke with the consent of the trustee and her husband.

Apparently neither the Government nor any of the courts conceived that the gift was taxable under Section 302 (c) of the Revenue Act of 1926 as in contemplation of death merely because donor intended to and did provide for her children after death. Taxability was pressed solely on the ground that it fell within Section 302 (d) of that Act covering revocable gifts. The decision involved the constitutionality of the provision. It was hard fought and resulted in a five to four decision by this court upholding Section 302 (d). Yet the Government contends that both it and this court completely overlooked the all-important fact, if true, that the gift was taxable on its face under the contemplation of death provision because its purpose was to provide for beneficiaries after decedent's death.

In discussing the power of Congress to tax a gift revocable only with the consent of the donee, Mr. Justice Roberts speaking for the court used this significant language (p. 92):

“ * * * It was appropriate for Congress to prescribe that if, subsequent to the passage of that Act, the creator of a trust saw fit to reserve to himself jointly with any other person the power of revocation or alteration, the transaction should be deemed to be *testamentary in character, that is, treated for the purpose of the law as intended to take effect in possession or enjoyment at the death of the settlor.*”

HELVERING v. HELMHOLTZ.

In *Helvering v. Helmholtz*, 296 U. S. 93, decided November 11, 1935, donor in 1918 created a trust reserving the income to herself for life, “remainder to her appointee by will and remainder to her issue.” She reserved the power with the consent of all the “then beneficiaries” to revoke.

The Government battled this case through the courts without even suggesting taxability under the contemplation of death provision. It based its whole claim on the power to revoke. This court denied taxability. Yet the intent to provide for beneficiaries after donor's death is self-evident. Moreover, the provision was to be made as donor should appoint by will. Is it not obvious that for years the Treasury, the courts and Congress have given an entirely different meaning to contemplation of death than that asserted by the Government in this case?

WHITE v. POOR.

In *White v. Poor*, 296 U. S. 98, decided November 11, 1935, half of the income was reserved to donor for life; after her death to go to her children and on their death to their appointees.

Again, we find the clear intent to provide for the beneficiaries after donor's death. "The fact that upon the final distribution the property would go to her descendants after the death of the survivor of the beneficiaries is not enough to justify a finding that the transfer was made in contemplation of death, within the meaning of the statute imposing estate taxes." (*Poor v. White*, 8 Fed. Supp. 995, 996.)

On appeal the Government completely abandoned any such claim and relied on the power of the trustees to revoke as making it taxable under Section 302 (d). But the Court of Appeals (*White v. Poor*, C. C. A., 1, 75 F. (2d) 35) and this court held it not taxable.

**HASSETT v. WELCH; HELVERING v. MARSHALL;
HELVERING v. BULLARD.**

As recently as February 28, 1938, the doctrine of these cases has been reiterated by this court in three cases:

Hassett v. Welch, 303 U. S. 303, 82 L. Ed. 575.

Helvering v. Marshall, 303 U. S. 303, 82 L. Ed. 575.

Helvering v. Bullard, 303 U. S. 297, 82 L. Ed. 572.

In all of these cases the income was reserved to donor for life, his intention being to provide for his dependents after his death. In the first two cases the attempted tax was defeated because the gift was made prior to the Joint Resolution of March 3, 1931, taxing as a part of the estate gifts in which the income is reserved to donor for life. In the latter case the tax was sustained because the gift was subsequent thereto. In none of the cases was the gift held to be in contemplation of death. In all, that claim had been abandoned by the time they reached the Supreme Court.

The argument of the District Court in *Welch v. Hassett*, 15 Fed. Supp. 692, is much the same as that of the

Government here. It was answered by the Court of Appeals (First Circuit), 90 F. (2d) 833, and the contention completely abandoned by the Government when it came to the Supreme Court. Said the Circuit Court at p. 837:

"The first two assignments of error may be considered together and raise the issue whether a trust created to relieve the creator of the demands of his relatives and friends, and to dispose of the estate received from his brother after reserving to himself the entire income thereof for life, as a matter of law, renders the transfer by the trust instrument to have been made in contemplation of death and intended to take effect in possession and enjoyment after the death of the creator and testator.

"The decisions of the Supreme Court appear to be contrary to this ruling.

"In *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244, the decedent and creator of the trust transferred properties to a trustee to pay the net income to her husband for life, after his decease to the decedent herself, and after her decease to her children. The court said, 281 U. S. 238, at page 243 * * *;

"The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent.'" (Citing *Burnet v. Northern Trust Co.*, 283 U. S. 782; *Morsman v. Burnet*, 283 U. S. 783; *McCormick v. Burnet*, 283 U. S. 784; *Reinecke v. Northern Trust Co.*, 278 U. S. 339.)

"Nor does the reasoning bind this court by which the District Court arrived at its conclusions, that the creator, having accomplished his purpose of evading the burden of managing his estate, as well

as the importunities that he found would inevitably follow the ownership of an estate of over \$3,000,000, took one step more and made provisions in the same instrument for disposing of the entire fund after his death, which the court suggests was done to avoid the estate taxes.

"To dispose of one's property after the termination of the trust existed as one of the major motives in all the cases above cited, and yet the court held that it did not prevent a present, completed, and irrevocable transfer so far as the creator was concerned.

"We think it is clear from the facts found and admitted by the pleadings that it does not follow from the trust instrument in this case that it was made in contemplation of death, nor intended only to take effect in enjoyment or possession after the creator's death. . . . The interpretation of the trust deed is a question of law, in view of facts found by the court. We, therefore, are of the opinion that a denial of the motion of the plaintiffs for judgment made during the trial and presumably at the close, was an error of law.

"We think the District Court's interpretation of the trust instrument, in the light of the facts found by him and the admitted facts in the pleadings, was error, and the motion of the plaintiffs for judgment should have been granted."

HISTORY OF ESTATE TAX LAW AND REGULATIONS.

The Circuit Court's Ruling is Contrary to the Estate Tax Law and the Treasury Regulations.

On September 8, 1916, the first of the current series of Federal Estate Tax laws was enacted. It contained the following provision:

"Section 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, . . . wherever situated: . . ."

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . ."

It will be noted that two different types of transfers are reached by this provision: (1) Transfers in contemplation of death, and (2) those intended to take effect in possession or enjoyment at or after death. In all the reenactments of the law this language has remained substantially unchanged.

It is obvious that all gifts "intended to take effect in possession and enjoyment at or after donor's death" are designed to be used by the beneficiaries after donor's death. Such gifts are intended to make provision for the beneficiaries after donor's death, not during his life. None of the property or increment thereof is intended to or will reach them till after his death.

The Court of Appeals in effect says that all such gifts are as a matter of law in contemplation of death regardless of all other evidence. It is evident, however, that Congress did not think so or it would not have specified gifts "intended to take effect in possession or enjoyment at or after his death." The law reads "in contemplation of or intended, to take effect in possession or enjoyment at or after his death." If all cases where the intent is to provide for the objects of donor's bounty after his death are covered by the contemplation of death provision, then the possession and enjoyment provision is useless.

" . . . It is a cardinal rule of statutory construction that significance and effect shall, if pos-

sible, be accorded to every section, clause, word or part of the act. In applying the rule it frequently occurs that a particular construction of a provision which the court is urged to adopt cannot be sanctioned, because, according to the view suggested, certain other provisions would thereby be rendered unnecessary, and it should not be presumed that any provision is redundant or useless." 25 R. C. L. 1004, 1005, S. 246.

In *Sarlis v. United States*, 152 U. S. 570, an Act of Congress forbade the sale "of any spirituous liquor or wine" to Indians. The government contended that all intoxicating drinks were within the statute, but the court said:

"That by the term 'spirituous liquors,' used alone in the statute, it may with some plausibility be contended the legislature meant to signify all intoxicating drinks. But the case is quite different when 'wines' are added to the articles prohibited. In that case it is evident that the legislature did not think that all intoxicating drinks were included in the term 'spirituous liquors,' or they would not have named 'wines.' Under the construction put by the court below on the words 'spirituous liquors,' as including all liquors that are intoxicating, and hence as including lager beer, the word 'wines' is useless in the statute."

In our case, if the Circuit Court is right that all gifts intending to provide for beneficiaries after donor's death are in contemplation of death, then Congress did a further useless thing in passing the Joint Resolution of March 3, 1931, specifically adding a provision for the taxation of gifts where donor has reserved a life interest. Not only that, but the Revenue Act of 1932 specifically added "this

*The addition is in italics.

third category of taxable gifts to the contemplation of death and possession and enjoyment provisions of the statute:—"To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer by trust, or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property. * * *"

By making such amendment Congress plainly says that such cases are not within the meaning of the statutory words "contemplation of death" and that to make them taxable it was necessary to so amend the statute. Nor did the Treasury itself conceive that the mere intent to provide for the beneficiaries after donor's death spelled contemplation of death.

In all the long series of estate tax regulations, from Regulations 37 in 1916 down to Regulations 80 in 1938, it has never been claimed that "contemplation of death" had any such meaning. Health, motive, anticipation of death, age and length of time before death—all the usual evidence on the question of contemplation is detailed, but there is nothing about gifts intended to provide for beneficiaries after death. On the contrary, over and over again the regulations have asserted taxability of only one class of such gifts, namely, those reserving a life interest to donor and of those solely on the ground that such gifts were intended to take effect in possession or enjoyment at or after donor's death.*

* Art. 24, Regulations 37, 1921 Edition:

"A transfer is taxable where the grantor reserves to himself during life the income of the prop-

The enjoyment of life insurance is obviously postponed till after the death of the insured. In the main its purpose is to provide for the beneficiaries after his death. That the Treasury considered this fact not the test of contemplation of death is evidenced by the fact that it has recognized that the beneficiary of a policy may or may not be named in

erty transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. * * *

Art. 18, Regulations 80, 1937 Edition:

"The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation or retention by the decedent of the use, or the possession, or the rents or other income or enjoyment of the transferred property, or any part thereof, for his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence his intention that it should extend at least for the duration of his life; * * *

* * * The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. * * *

contemplation of death, depending on circumstances entirely aside from the fact of postponed enjoyment.*

The Joint Resolution of March 3, 1931, and the Revenue Act of 1932 (June 6, 1932) were enacted in the face of the continuous Treasury interpretation that mere intent to provide for dependents after donor's death was not equivalent to contemplation of death and of repeated decisions of the Supreme Court culminating on March 2, 1931, with *McCormick v. Burnet*, *supra*, where the income was to accumulate until donor's death; *Morsman v. Burnet*, *supra*; and *Burnet v. Northern Trust Company*, *supra*, where donor reserved the income for life. In each case the gifts were held not taxable though they made provision for the beneficiaries after donor's death. Congress immediately sprang into action. On the very next day a Joint Resolution was passed amending the Revenue Act of 1926.

* Art. 30, Regulations 63, 1922 Edition:

"Insurance receivable by the estate must be included in the gross estate of all decedents who died after September 8, 1916. Insurance payable to beneficiaries other than the estate, however, need not be included in the gross estate of decedents who died before the effective date of Title IV of the Revenue Act of 1918, unless the insurance was originally payable to the estate, and the policy was thereafter assigned or made payable, to a specific beneficiary in contemplation of, or intended to take effect in possession or enjoyment at or after the decedent's death; such assignment or change in beneficiary not being or a fair consideration in money or money's worth."

In 1927, the Treasury ruled, G. C. M. 1164, C. B., June, 1927, p. 315, that the proceeds of life insurance were not taxable under the contemplation of death provision since there was a specific provision in the statute covering such proceeds. In G. C. M. 16932, C. B., December, 1936, p.

It might have provided for the taxation of all gifts in trust where the income was withheld from the beneficiary until the death of donor. But it did not. It singled out the classes of such gifts it intended to tax, namely, the ones where a life income was reserved to the donor himself. The applicability of the maxim of statutory construction, "*expressio unius est exclusio alterius*" is evident.†

299, this ruling was revoked. In commenting on this latest General Counsel's Memorandum, Prentice-Hall Estate Tax Service for 1938 in an editorial note to Paragraph 23309 states:

"The above G. C. M. 16932 will place upon the executor the burden of proving that the transfer of life insurance in a decedent's estate was not a transfer in contemplation of death."

The kind of evidence applicable to such proof appears in *Billings v. Commissioner of Internal Revenue*, 35 B. T. A. 1147, where it is said at p. 1152:

" * * * He assigned these policies to named persons on June 24, 1931, or within six months from the date of death. The respondent held that the assignment was in contemplation of death. At the time the decedent was suffering from a chronic cardiac valvular disease. The petitioners have offered no evidence to show that the assignment was not made in contemplation of death. We accordingly hold that they were so assigned."

† See 25 R. C. L., p. 981, Sec. 229:

In *Mackay et al. v. Commissioner*, U. S. C. A. (C. C. A. 2) February 7, 1938, 94 Fed. (2d) 558, the court calls attention to the fact that "The enactment in 1924 of Section 302 (d) is an indication that Congress then recognized the limited scope of Section 302 (c), or to say the least, doubted that subdivision (c) included cases of this kind."

That such executive and judicial construction, excluding from the category of gifts per se in contemplation of death those not intended to come into beneficiaries' use until after the donor's death, has also become the binding legislative construction can hardly be doubted. It is too late to claim that all such gifts are per se testamentary and therefore in contemplation of death. The term "contemplation of death" may be vague. Its meaning may not be clear and certain, but one thing about it that is clear and certain is that it has not the meaning on which the lower court relies.

The continuous Treasury and court construction of the term "contemplation of death" as not including gifts merely because intended to provide for beneficiaries after donor's death has by legislative reenactment become a part of the law.

In *Hecht v. Malley*, 265 U. S. 144, this Court said, at p. 153:

" * * * In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment. *Sessions v. Romadka*, 145 U. S. 29, 43, 36 L. Ed. 609, 614, 12 Sup. Ct. Rep. 799; *Latimer v. United States*, 223 U. S. 501, 504, 56 L. Ed. 526, 527, 32 Sup. Ct. Rep. 242."

In *Hassett v. Welch*, *supra*, Mr. Justice Roberts speaking for the Court said:

Section 302 (c) is the contemplation of death provision and 302 (d) also made taxable trusts "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke."

"Not only is the legislative history of Sec. 803 (a) of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought. Moreover, the reenactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative constructions of the provision it re-enacted."

In *Copper Queen Consolidated Mining Company v. Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474, 51 L. Ed. 1143, Mr. Justice Holmes, speaking for the Court, used the following language, at p. 479:

" * * * And again, when, for a considerable time, a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 401, 402, 50 L. Ed. 515, 525, 26 Sup. Ct. Rep. 272."

To like effect are *Massachusetts Mutual Life Insurance Co. v. United States*, 288 U. S. 269; *Murphy Oil Company v. Burnet*, 287 U. S. 299; *Hartley v. Commissioner*, 295 U. S. 216; *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289; *Burnet v. Chicago Portrait Co.*, 285 U. S. 1.

THE GOVERNMENT'S POSITION IN THIS CASE.

The Government's position as disclosed by its brief on certiorari is based not only on a mistaken definition of contemplation of death, but includes a wholly erroneous theory of what constitutes a testamentary disposition of property. The outstanding and characteristic difference between a testamentary gift and an *inter vivos* gift is found

in the fact that the testamentary gift is ambulatory until the death of the testator. It has no binding effect on the testator until that time. It confers no rights. He can revoke it at will. An *inter vivos* gift binds him during his life—and creates vested interests in the donees—and that, regardless of when the donee actually gets its use and benefit—whether before or after donor's death.

The Government says (Brief opposing certiorari, p. 7):

“ * * * If a testamentary disposition is defined as one intended to provide for the objects of testator's bounty at death, then clearly a substitute therefor is one which is intended to accomplish the same purpose, even though title is presently transferred.”

The major trouble with the argument is that it is not properly so defined. * We have heretofore, we believe, demonstrated that fact.

Equally amazing is the Government's argument as to what constitutes a substitute for a will (Brief opposing certiorari, p. 5):

“ * * * The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument * * *. Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and when the instrument creating the trust is other than a will, that estate or interest must pass

“ . . . To accomplish the result intended, he changed his will, in which he had set up a testamentary trust, and in place thereof made the transfer in trust in *praesenti*. The reason for making the substitution, asserted by the petitioners, is that the decedent desired to speculate. But this was not the reason for making the gift, but only for making it in the form of a trust instead of a will. Since the trust was made in lieu of the will, it was clearly a *pro tanto* substitute for the prior testamentary disposition of the property.”

But the will was never changed. It was executed two years before the creation of the trust (R. 44) and probated without change. Possibly the Government meant that every gift of property lessens the amount remaining to be given by will. True, but meaningless. But says the Government: The gift was a substitute for the will; the transfer was made by gift instead of by will only to avoid losing the property in the stock market. That admission is quite important. It admits that the gift accomplished something that could not be accomplished by will, and that that something was the motive causing the transfer at the time it was made. Can that be termed a substitute for a will in any different sense than every gift is a substitute for a will? It was wholly different from a will in every respect save one. It accomplished a definite, important purpose during donor's life in saving the property from the dangers of the market.

immediately. . . . But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the *cestui* may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate.” *Nicholas v. Emery*, 109 Cal. 323, 329, 41 Pac. 1089: Quoted in Perry on Trusts and Trustees, Seventh Edition, Vol. 1, p. 119.

The testator irrevocably parted with title during his life. The right thereto irrevocably vested in donees during his life. Nothing in connection with it depended on probate at his death. The only resemblance to a will is in the fact that the donees were not permitted to spend any of the money during donor's life. That is a characteristic of many gifts not testamentary in nature.

But the Government seems to contend that since he had drawn a will two years before, devising the bulk of his estate in trust for his daughter, this gift in trust was therefore testamentary and merely a substitute for the will. Logically, the same argument would have applied if the will had made an outright devise to the daughter and the gift had been an outright gift without the intervention of a trust.

To contend that a person who draws a will must thereafter make his *inter vivos* gifts either to a different person or of a different character than provided in the will, in order to avoid having the gift declared a testamentary substitute, wholly disregards the essential characteristics of the two methods of transfer. It exaggerates nonessential incidents into major characteristics. If sound, it would follow that one who has not made a will, but whose estate will pass to his heir at law, can make no gift to such heir without its being a substitute for disposition at death and therefore in contemplation of death—in complete disregard of health, age, activity, thought of future life, anticipation of death or motive in making the gift. The argument is palpably unsound.

The statute makes contemplation of death the condition of the imposition of the tax. The transfer must be brought about by fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health.

The Government seems to propose a substitute for the statutory condition. It would disregard these usual factors and declare that all transfers are subject to the tax if the

provisions of the trust closely resemble the disposition made by a prior will. It is doubtful if even a statutory provision could constitutionally make a conclusive presumption that such gifts are in contemplation of death. Yet the Government in this case would have the Court, in effect, add such a provision to the statute by judicial fiat and then declare it constitutional.

In the *Igleheart* and *Updike* cases (*Igleheart v. Commissioner*, 77 F. (2d) 704; *Updike v. Commissioner*, 88 F. (2d) 807) relied on by the Government, contemplation of death was found by the Board of Tax Appeals in the light of all the facts—not simply from the nature of the trust instruments. Those findings of fact, taking into consideration health, purpose and all other elements, were sustained by the Court of Appeals. The cases are hardly authority for the proposition that everything must be disregarded save the nature of the trust instrument.

IX.

CONCLUSION.

There is not an intimation in the evidence, the findings of the Board of Tax Appeals or the opinion of the Circuit Court of Appeals that there was any intent or attempt by Mr. Hendrie to evade the provisions of the estate tax law. Commendable motive is conceded by the lower Court. His motive of avoiding loss in the stock market was one definitely associated with life and clearly indicates a definite concern connected with his future activities.

In determining the proximate cause of this *inter vivos* transfer, the Court will search the record in vain to find anything to indicate that it would have been made but for Mr. Hendrie's fear of the market. Love of family and desire that his daughter have something after his death may have contributed to that fear, but the fear caused the *inter vivos* transfer.

The undisputed evidence of his soundness of health and mind, his activities in life, his annual trips to California, his golf, his attention to business, his plans for future market speculations, and the continuance of those activities for more than five years after the gift, are certainly some evidence on the question of his expectancy of death.

Is all this, including the finding of the Board of Tax Appeals, to be held for naught, on the theory that intent to provide for beneficiaries after death—an intent that is present every time a life insurance policy is written or a premium thereon paid—is conclusive evidence that at the particular time the donor had an unusual and special expectation of death, not common to the ordinary man, described as contemplation of death?

We respectfully submit that the lower Court was without power to overrule the determination of the Board of Tax Appeals that this gift was not in contemplation of death, and urge that its decision be reversed.

Respectfully submitted,

MORRISON SHAFBOTH,
Denver, Colorado,
Counsel for Petitioners.

Of Counsel:

W. W. GRANT,
HENRY W. TOLL,
RANGER ROGERS,
Denver, Colorado.

APPENDIX A.

The Government's claim is based on Section 302 (c) of the Revenue Act of (February 26) 1926, as amended, 26 U. S. C. A., Sec. 411 (c); 44 Stat. 70; March 3, 1931, c. 454, 46 Stat. 1516; June 6, 1932, c. 209, Sec. 803 (1), 47 Stat. 279:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Joint Resolution of March 3, 1931 (Public No. 131—
Seventy-first Congress):

**"RESOLVED BY THE SENATE AND
HOUSE OF REPRESENTATIVES OF THE
UNITED STATES OF AMERICA IN CONGRESS
ASSEMBLED,** That the first sentence of subdivision
c) of Section 302 of the Revenue Act of 1926 is
amended to read as follows:

"To the extent of any interest therein of which
the decedent has at any time made a transfer, by
trust or otherwise, in contemplation of or intended
to take effect in possession or enjoyment at or after
his death, including a transfer under which the trans-
feror has retained for his life or any period not end-
ing before his death (1) the possession or enjoyment
of, or the income from, the property or (2) the right
to designate the persons who shall possess or enjoy
the property or the income therefrom; except in case
of a bona fide sale for an adequate and full consider-
ation in money or money's worth."

APPENDIX B.

Estate Tax Regulations 37, 1921 Edition.

“TRANSFERS IN CONTEMPLATION OF DEATH.

“ART. 23. *Nature of transfer.*—The words ‘in contemplation of death’ do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death whenever the person making is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession of the property. Transfers made within two years of a decedent’s death are presumed to be taxable if they are of a material part of his property and are in the nature of a final disposition thereof. Where a transfer of this character, the executor must disclose the transfer on the return; but he may submit therewith evidence that it was not made in contemplation of death. The executor must also return transfers by the decedent of a material part of his property to relatives, though made more than two years before his death; but he need not list them as taxable if he contends otherwise. All facts relating to the transfer should be stated, including the motive therefor, the decedent’s state of health, and his anticipation of death. The presumption of taxability may be rebutted by proof that the transfer was not induced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature. The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent’s estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death.

**“TRANSFERS INTENDED TO TAKE EFFECT
AT OR AFTER DEATH.**

“ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to some one other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable.”

Estate Tax Regulations 68, 1922 Edition.

"TRANSFERS IN CONTEMPLATION OF DEATH.

§ 'ART. 18. *Nature of transfer.*—The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property. Any transfer made by a decedent within two years prior to his death, without a fair consideration in money or money's worth, is presumed to be taxable if of a material part of his property and in the nature of a final disposition or distribution thereof. The executor must return the value, as of the date of decedent's death, of all property transferred by the decedent at any time in contemplation of death, where the transfer was not a bona fide sale for a fair consideration in money or money's worth, and must disclose in the return all transfers of a material part of decedent's property made at any time without such consideration, but need not include in the gross estate the value of such thereof as he contends were not made in contemplation of death, in which event he may submit with the return evidence of all material facts tending to disclose the decedent's motive at the time, his then anticipation of death, and mental and physical condition.

"The presumption of taxability of a transfer made within the two-year period may be rebutted by proof that it was not made under the conditions stated in the statute, and such proof must be filed with the return. Unless proof is submitted which is sufficient to rebut the presumption the

transfer will be included in the gross estate in computing the tax.

"The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability."

Estate Tax Regulations 70, 1929 Edition.

"TRANSFERS IN CONTEMPLATION OF DEATH

"ART. 16. *Nature of transfer.*—The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property.

"Transfers made by the decedent in his lifetime, other than transfers intended to take effect in possession or enjoyment at or after death (see Art. 17), excepting bona fide sales for an adequate and full consideration in money or money's worth, must be returned for tax, or disclosed in the return, as follows (see also Art. 20):

.

"The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not, in and of itself, determinative of its taxability."

THE

On

Of C
W.
Hr
Ra
1